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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1500

DON R. ERICKSON, Warden
South Dakota State Penitentiary, Petitioner,

v.

United States of America ex rel.
JOHN LEE FEATHER, Respondent,

United States of America ex rel.
LAVERNE BLACK THUNDER, Respondent,

United States of America ex rel.
AMBROSE ST. JOHN, Respondent,

United States of America ex rel.
JAMES R. KEEBLE, Respondent

United States of America ex rel.
CURTIS SHALL, Respondent,

United States of America ex rel.
ROMAN V. DERBY, Respondent,

United States of America ex rel.
JOSEPH DAY, Respondent

United States of America ex rel.
ARNOLD LAFROMBOISE, Respondent

United States of America ex rel.
CLARENCE WALKER, Respondent,

United States of America ex rel.
THEODORE DUANE WYNDE, Respondent.

(Nos. 73-1453 to 73-1459 and 73-1541 to 73-1543)
Eighth Circuit Court of Appeals

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"For reasons that will become evident we find it necessary to depart from the holding in DeMarrias."

DeMarrias Supra was not in conformity with the cases of the Supreme Court of the United States.

Seymour v. Superintendent, 368 U.S. 351 (1962)

Mattz v. Arnett, 93 S.Ct. 2245 (1973)

McClanahan v. State Tax Commission of Arizona, 93 S.Ct. 1257 (1973)

Nor was DeMarrias Supra in conformity with the other cases of the Circuit Court of Appeals or with our own District Court here in this state or the Supreme Court of the State of South Dakota.

United States ex rel. Condon v. Erickson, 478 F.2d 684 (1973)

Beardslee v. United States, 387 F.2d 280

State of South Dakota ex rel. Hollow Horn Bear v. Jameson, 95 N.W.2d 181

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United States v. Celestine, 215 U.S. 278

Hilderbrand v. Taylor, 327 F.2d 205 (1964) (Tenth Circuit Court of Appeals)

It was, therefore, necessary for our present Circuit Court of Appeals, in order to have uniformity of decisions, to reverse DeMarrias supra as they did, and also it was necessary for the Circuit Court of Appeals to reverse DeMarrias supra as they so ably stated to bring it in line with the direction of our United States Supreme Court as set out in the cases above.

The petitioner gives considerable weight to the idea that now more time and research has been presented after the Eighth Circuit Court of Appeals handed down its decision in the case in question, and from which they are trying to get this Writ of Certiorari, and they now admit that this material was not presented to the Circuit Court of Appeals.

It is the Respondents' position that all of the material was presented before the Circuit Court of Appeals, that a copy of the 1867 Treaty was made a part of the Respondents' Brief, and that the Circuit Court of Appeals referred to it in their opinion very specifically and they even went further with the other parts and stated:

> "Nothing that can be gleaned from the legislative history or subsequent legislative enactments can be fairly said to shed any further light upon the intent of the Congress regarding the reservation boundaries. The Committee reports on the 1891 Act and reports on similar bills that were not enacted do not discuss the proposed boundaries. The only direct reference to the boundaries of the reservation subsequent to the 1891 Act came from President Harrison in his proclamation opening the lands 'within the Lake Traverse Reservation' to settlement. (emphasis supplied)" 27 Stat. 1017

It is the Respondents' further position that new material cannot properly be presented before this Court on an appeal but must have been originally presented to the lower Courts.

> United States of America v. Ray Keith Atkinson, 297 U.S. 157, 80 L.Ed. 555
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> Pennsylvania Railroad Company v. Illinois Brick Company, 297 U.S. 796, 80 L.ed. 796
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> 5 Am.Jur. 2d, Page 32 #547:
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> "The general rules that questions, to be

> available on appeal or review, must be raised and reserved in the lower court, and that the higher court can consider the case only on the theory of the parties in the lower court, apply on an appeal from the judgment of an intermediate appellate court."

The petitioner does not try and enlighten the rest of us as to what this further research has presented but they are asking us to buy a pig in a poke and we, therefore, do not get an opportunity in this brief to refute or properly answer any of this material that they think they have found, and it is our contention that all of this has been previously considered by the Circuit Court of Appeals.

CONCLUSION

The appellant is not alleging that the case in question is not in conformity with the other Circuit Court of Appeals cases, and in fact, the opposite is true that it is in conformity and it is not an appeal from a State Court decision at all, that the case that they relied on, DeMarrias supra, was by this Circuit Court of Appeals reversed and that any additional information that they have not presented to the prior Court would not properly come before this Court but that in reversing DeMarrias supra, upon which the Spider case supra relied, it brought this in conformity as was necessary with the other Circuit Courts and with the other decisions from this Circuit Court as well as in the District Courts within this Circuit.

Respectfully submitted

L. R. Gustafson
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